

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2008 Session

JANE CHERA v. INDYMAC, INC. ET AL.

**Appeal from the Chancery Court for Davidson County
No. 04-1181-I Claudia Bonnyman, Chancellor**

No. M2007-00043-COA-R3-CV - Filed October 21, 2008

This appeal is taken from the denial of plaintiff's Tenn. R. Civ. P. 59 and 60 motion for relief from the dismissal of her action for failure to prosecute. Plaintiff sued the loan servicing company and the subsequent buyer of her residence for claims based on the alleged wrongful foreclosure on the property. The complaint was filed on April 21, 2004, and dismissed with prejudice on July 14, 2006, as a sanction for failing to comply with discovery orders. Finding the trial court did not abuse its discretion, we affirm the judgment of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Andrew M. Cate, Nashville, Tennessee, for the appellant, Jane Chera.

Jason S. Mangrum, Brentwood, Tennessee, for the appellee, Indymac, Inc.

J. Trent Lehman, Nashville, Tennessee, for the appellee, George Mitchell.

OPINION

Factual and Procedural History

Because the judgment of dismissal for plaintiff's failure to prosecute forms the basis of this appeal, we summarize the procedural posture of the action in detail. Jane Chera filed a complaint on April 21, 2004, against IndyMac, Inc. and George Dwain Mitchell (collectively "Defendants") alleging breach of contract, bad faith, breach of fiduciary duty, outrageous conduct, and conspiracy. Ms. Chera sought damages for the alleged wrongful foreclosure of her residential property located at 6513 Rolling Fork Drive, Nashville, Tennessee, (the "Property") and to set aside the subsequent sale of the Property. Defendant IndyMac is the loan servicing company for loans secured by the Property. Defendant Mitchell is Ms. Chera's ex-husband and was the successful bidder at the

foreclosure sale.¹ The parties dispute whether Ms. Chera defaulted on the mortgage payments and whether she had notice of the foreclosure.

On June 4, 2004, Ms. Chera moved for default judgments against the Defendants for failing to answer the complaint. Mr. Mitchell filed an answer, counterclaim, and crossclaim on June 10, 2004, and IndyMac answered on June 14, 2004. Mr. Mitchell asserted a crossclaim of negligent misrepresentation against IndyMac and alleged the following counterclaims against Ms. Chera: breach of contract, breach of fiduciary duty, negligence, gross negligence, and outrageous conduct. The counterclaims were based, in part, on the final marital dissolution agreement (“MDA”) entered November 27, 2001, in which Ms. Chera was awarded full title to the Property and was responsible “to timely pay and hold [Mr. Mitchell] harmless for all mortgages, debts, taxes, insurance, and other expenses. . . .” Mr. Mitchell also sought a declaratory judgment quieting title to the Property, possession, and the fair market rental value from the date of purchase.

Ms. Chera filed a motion to dismiss the counterclaims asserting that the chancery court lacked jurisdiction over claims arising from the MDA because it was an order of the Fourth Circuit Court of Davidson County. On August 13, 2004, the chancellor ordered that Mr. Mitchell’s counterclaims be “dismissed as they relate to this proceeding,” severed, and transferred to the Fourth Circuit Court “to be pursued pursuant to the divorce proceedings in that Courtroom.”

Between October 2004 and June 2006, Ms. Chera changed counsel three times while the parties engaged in discovery.² Pursuant to an April 7, 2005 scheduling order, the court set a deadline to depose Ms. Chera by June 1, 2005, and directed the parties to participate in mediation by July 1, 2005. The final disposition of the case was to occur no later than August 1, 2005. None of the above deadlines were met.

Mr. Mitchell filed a motion for injunctive relief on April 4, 2005, seeking either mortgage payments or fair market rental payments from Ms. Chera for her possession and use of the Property pending the outcome of the action. The court denied the motion on May 11, 2005. He then filed a

¹Mr. Mitchell previously filed a detainer warrant for possession of the Property on April 1, 2004. By agreed order entered June 28, 2004, the detainer action filed by Mr. Mitchell in the General Sessions Court for Davidson County was transferred to and made part of Ms. Chera’s action in chancery court.

²Ms. Chera’s initial counsel of record withdrew from the case on October 26, 2004. After requesting additional time to secure new representation, Ms. Chera retained Lawrence D. Wilson who filed a notice of appearance on February 11, 2005. Mr. Wilson withdrew from the case on September 19, 2005, and Mark Henderson undertook representation on or before November 2005. On June 29, 2006, Mr. Henderson moved to withdraw as counsel because “communication has materially broken down between attorney and client, such that further representation . . . would not be effective, and be potentially detrimental to the client’s cause of action.” Ms. Chera’s current counsel of record, Mr. Andrew M. Cate, filed his notice of appearance on July 13, 2006.

motion for detainer, damages, unpaid rent, and attorney's fees on July 8, 2005. By order dated August 18, 2005,³ the court held:

1. Pursuant to the hearing on July 22, 2005, the Plaintiff had until August 6, 2005 to completely vacate the premises or begin incurring rental charges; and
2. That for every day beyond August 6, 2005 that Plaintiff retains possession of the premises, she shall incur rental charges on a daily basis; and
3. The amount of monthly rent to be used in prorating the daily rental charge shall be \$1,951.20 or \$65.04 per day; and
4. That upon fully vacating the premises, the Plaintiff shall through Counsel surrender over the keys to the property to Defendant Mitchell's Counsel. . . .

On or about August 2005, Ms. Chera was needed in Massachusetts to attend to her elderly mother and was granted additional time to respond to Defendants' discovery requests. In November 2005, Mr. Mitchell filed a motion for possession of the Property claiming that Ms. Chera had not vacated the premises. Ms. Chera then filed a motion to strike Mr. Mitchell's amended answer and counterclaim and other documents filed with the court.⁴ After a hearing on both motions, the chancellor entered the following order on January 9, 2006:

1. Defendant Mitchell's Motion for possession was well taken, and that possession shall be delivered immediately;
2. The Plaintiff shall have the option of regaining possession of the property pending a trial of this cause, by paying into the Court, the amount of rental payments which are the same amount as the mortgage payments, having accrued since August 6, 2005; and
3. The Plaintiff's Motion to Strike Defendant Mitchell's Amended Answer and Counterclaim was not well taken and that Defendant Mitchell's Amended Answer and Counterclaim shall be allowed. . . .

The parties agreed to waive a jury trial and continue with a bench trial on June 5-6, 2006. On January 17, 2006, the parties were ordered to appear for a judicial settlement conference before the Clerk and Master on or before February 28, 2006. The court instructed: "All parties must be

³The order was actually marked "received" by the court on August 18, 2005, but was not filed until August 26, 2005. In its final order of dismissal, the chancery court refers to this order as the one dated "August 18, 2005."

⁴In October 2005, Mr. Mitchell received a letter and a "Notice to Abate Nuisance" from the Metropolitan Government of Nashville regarding the condition of the Property and directing compliance with sanitation requirements.

present to confer with authority to settle. The parties will take depositions which are essential to settlement, *before that date*. The parties anticipate deposing Ms. Chera, one or two representatives of Indymac, Inc., and Mr. Mitchell.” (Emphasis added). The settlement conference took place on April 4, 2006, but Ms. Chera participated by telephone and did not personally appear. The parties were unable to reach a settlement agreement. At the time, Ms. Chera was again in Massachusetts attending to her ailing father. He died on May 27, 2006.

As of June 1, 2006, Ms. Chera had not been deposed. In an effort to accommodate Ms. Chera’s circumstances, the parties agreed by signed order on June 13, 2006, that Ms. Chera would be required to select the rescheduled date of her deposition from the following dates, listed in order of preference:

- a. June 15, 2006, at Noon at the Davidson County Chancery Court;
or
- b. June 22, 2006, at Noon at the Davidson County Chancery Court;
or
- c. June 26, 2006, at Noon at the Davidson County Chancery Court[.]

Ms. Chera was required to confirm her selected date for deposition in writing to opposing counsel no later than June 14, 2006. Ms. Chera failed to select a date as instructed. IndyMac filed a motion for contempt and to dismiss for failure to prosecute based on Ms. Chera’s failure to comply with the June 13, 2006 order. Mr. Mitchell adopted IndyMac’s motions and moved for sanctions.

On July 14, 2006, the chancellor dismissed Ms. Chera’s action with prejudice and made a thorough statement of the reasons for the dismissal. The court found that Ms. Chera repeatedly violated its orders to the substantial prejudice of the Defendants, citing in particular: (1) Ms. Chera’s failure to comply with the August 18, 2005 and January 9, 2006 orders directing her to make monthly payments for her use of the Property; (2) Ms. Chera’s failure to appear for court-ordered mediation in violation of the January 17, 2006 order; and (3) Ms. Chera’s failure to select a date for her deposition in violation of the June 13, 2006 order. The court found that Ms. Chera remained in the Property during 2005 and part of 2006 even though the Property had been sold at foreclosure and provided no explanation of why she failed to make monthly payments to the Clerk and Master as ordered. The court further found that, after the withdrawal of two lawyers, the appearance of Ms. Chera’s third lawyer caused delay because he was unfamiliar with the case. Based on these findings, the trial court dismissed Ms. Chera’s action with prejudice as a sanction for failing “to comply with specific court orders including orders regarding discovery.”

Ms. Chera filed a motion to alter or amend the dismissal or, in the alternative, motion for relief pursuant to Rule 60.02. The motion was denied by order on November 29, 2006, in which the trial court made further findings in support of its decision to dismiss the action. Ms. Chera appeals.

Jurisdiction of the Chancery Court

We first address Ms. Chera's jurisdictional challenge. Ms. Chera insists that the chancery court lacked jurisdiction to award Mr. Mitchell either rent or possession of the property with the entry of the August 13, 2004 order to dismiss the counterclaims of Mr. Mitchell. Upon review of the order, we find the chancery court retained jurisdiction over Mr. Mitchell's request to quiet title and, therefore, retained the authority to award possession of the premises and/or rent pending resolution of the case.

Ms. Chera raised her objections each time the issues of rent or possession were before the court arguing these were remedies available only for the counterclaims that were transferred. As explained by the trial court in its final order, there were two types of counterclaims asserted by Mr. Mitchell. The claims pertaining to any obligation Ms. Chera owed Mr. Mitchell pursuant to the MDA were transferred to circuit court. However, the counterclaim to quiet title following Mr. Mitchell's purchase of the Property at foreclosure remained with the chancery court. Accordingly, jurisdiction was proper.

Standard of Review

We review a trial court's denial of a Rule 59 motion to alter or amend a judgment under an abuse of discretion standard. *Chambliss v. Stohler*, 124 S.W.3d 116, 120 (Tenn. Ct. App. 2003). Our review of a trial court's decision on a Rule 60 motion for relief is also under an abuse of discretion standard. *J & B Invs., LLC v. Surti*, 258 S.W.3d 127, 132 (Tenn. Ct. App. 2007). "A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Caldwell v. Hill*, 250 S.W.3d 865, 869 (Tenn. Ct. App. 2007). Under this standard, we are required to uphold the ruling "as long as reasonable minds could disagree about its correctness." *Id.* Furthermore, "we are not permitted to substitute our judgment for that of the trial court." *Id.* Thus, under the abuse of discretion standard, we give great deference to the trial court's decision. *See Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003).

Tenn. R. Civ. P. 59 and 60 Motion

Motions to alter or amend a judgment pursuant to Tenn. R. Civ. P. 59⁵ may be granted "(1) when the controlling law changes before a judgment becomes final, (2) when previously unavailable evidence becomes available, or (3) when, for sui generis reasons, a judgment should be amended to correct a clear error of law or to prevent injustice." *Whalum v. Marshall*, 224 S.W.3d 169, 175 (Tenn. Ct. App. 2006). Litigants may also seek relief from a final judgment pursuant to Tenn. R. Civ. P. 60 for the following reasons:

⁵Ms. Chera filed the motion on August 18, 2006, within thirty days of the amended final order of judgment as required by Tenn. R. Civ. P. 59.02.

(1) mistake, inadvertence, surprise or excusable neglect; (2) fraud . . . misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment.

Tenn. R. Civ. P. 60.02.

When a party seeks either Rule 59.04 or Rule 60.02 relief, the burden of proof is on the moving party. *See Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003); *Henry*, 104 S.W.3d at 482. Ms. Chera does not contend that the controlling law in this cause changed at any time during the litigation of this matter or that new evidence became available and did not present evidence that an amendment was required to correct an error or prevent an injustice under Rule 59.04. Therefore, Ms. Chera failed to meet her burden of proving that the trial court abused its discretion when it denied her motion for relief pursuant to Tenn. R. Civ. P. 59.

Ms. Chera's argument focuses on the factors justifying Rule 60 relief, particularly excusable neglect and alleged misconduct of Defendants, as well as those stated in *Henry v. Goins*, 104 S.W.3d at 481. In *Henry*, the Supreme Court held that the same factors considered in setting aside a default judgment under Rule 60.02(1) should be considered in determining whether relief from an order of dismissal is appropriate. *Id.* As applied to this case, those factors are: (1) whether the acts giving rise to the dismissal were willful;⁶ (2) whether plaintiff has a meritorious claim; and (3) whether the defendants would be prejudiced if relief was granted. *Id.*

Considering whether Ms. Chera was at fault regarding the dismissal, it is undisputed that Ms. Chera failed to select a date from the three provided as required by the June 13, 2006 order. Based on the arguments of counsel and order of the court, the failure to comply with this discovery order was the impetus for dismissing the case with prejudice. The case was contentious and ongoing for more than two years.⁷ It had been set for trial three different times. Despite the fact that Ms. Chera's counsel of record at the time the June order was signed stated that he did not tell her she had to appear for deposition on any particular date, there is no evidence that Ms. Chera sought a continuance or provided alternate dates for deposition. The chancellor noted that "[i]t is well settled

⁶We note that the willfulness standard "no longer categorically excludes 'mere negligence' or 'carelessness' of an attorney from the scope of 'excusable neglect' under Tenn. R. Civ. P. 60.02(1) with regard to setting aside default judgments." *World Relief Corp. of the Nat'l Ass'n of Evangelicals v. Messay*, No. M2005-01533-COA-R3-CV, 2007 WL 2198199, *7 (Tenn. Ct. App. July 26, 2007). However, "failure to respond to a court order that undisputedly was received by the attorney is not excusable neglect." *McGill v. State*, No. M2007-00040-COA-R3-CV, 2008 WL 151984, *2 (Tenn. Ct. App. Jan. 16, 2008) (no Tenn. R. App. P. 11 application filed).

⁷On February 23, 2005, Ms. Chera filed a motion requesting the chancery court extend the one year disposition requirement of Local Rule 18.01. It appears this request was granted by entry of the case management order setting August 1, 2005, as the disposition date.

in Tennessee that notices and facts given to an attorney, are imputed to the client whether the lawyer communicates with the client or not. *See e.g., Winstead v. First Tennessee Bank, N.A., Memphis*, 709 S.W.2d 627 (Tenn. Ct. App. 1986).”

The second factor requires Ms. Chera to show she has a meritorious claim. To that end, Ms. Chera has provided ample evidence to support her case. In our opinion, Ms. Chera is required only to show that she has a viable claim. In concluding that Ms. Chera has met the second factor, we make no judgment with respect to the sufficiency of that evidence or the likelihood of her success in a trial upon the merits of her action.

As to the third factor, Defendants both contend they would be prejudiced if this court reinstated Ms. Chera’s case. We note that “[s]imply having to proceed to trial does not constitute prejudice, nor does the mere passage of time.” *Henry*, 104 S.W.3d at 482. Nevertheless, undue delay in actions involving real property can affect the value of the property and the use and enjoyment of the property.

The chancellor gave a well-reasoned and thorough explanation for dismissing Ms. Chera’s action, expressly stating: “Dismissal is a harsh sanction. However, it is specifically authorized by the Rules, and cogent reasons exist for its imposition. *Holt v. Webster*, 638 S.W.2d 391 (Tenn. Ct. App. 1982). [Ms. Chera] was given considerable opportunity to comply with the orders and she presents no reasons for the failure.” Upon consideration of Ms. Chera’s post-judgment motion, the court reasoned:

Although the Court takes no pleasure in doing so, balancing all of the plaintiff’s behavior in the case, which the court set out in its July 14, 2006 order, the court does decide to exercise its discretion to uphold the order and deny the Rule 59 motion and the Rule 60 motion.

We see no evidence that the trial court applied an incorrect rule of law or reached an illogical decision. The transcript of the hearing and final order reflect detailed findings of fact and consideration of the relevant factors and circumstances. Based upon the *Henry v. Goins* factors and the record in full, we are not convinced that Ms. Chera has demonstrated excusable neglect in prosecuting this action. We conclude that the chancery court did not abuse its discretion when it denied Ms. Chera’s motion to alter or amend the judgment of dismissal. We affirm the judgment of the trial court in favor of Defendants on this basis and, therefore, need not address the issue of estoppel/election of remedies.

Conclusion

We find that the chancery court did not apply an incorrect legal standard or reach an illogical decision when it denied the plaintiff’s motion to alter or amend or grant relief pursuant to Tenn. R. Civ. P. 60.02 from its order of dismissal. Therefore, we find no abuse of discretion. The judgment

of the Chancery Court for Davidson County is affirmed. Costs of appeal are assessed against the appellant, Jane Chera, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE